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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 85.

CITIES SERVICE GAS COMPANY, a Corporation,
Appellant,

vs.

STATE CORPORATION COMMISSION OF KANSAS, MARION BEATTY, Chairman, RICHARD C. BYRD and HARRY G. WILES, As Members of Said Commission, and Their Respective Successors in Office, *Appellees.*

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF APPELLEES.

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STATE CORPORATION COMMISSION OF KANSAS, MARION BEATTY, Chairman, RICHARD C. BYRD and HARRY G. WILES, As Members of Said Commission, and Their Respective Successors in Office, *Appellees.*

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF APPELLEES.

THE QUESTION PRESENTED.

As appellees see it, the question presented is the following:

Does the Natural Gas Act preclude the State of Kansas from prohibiting withdrawal of natural gas from the

underground common source of supply except upon compliance with conditions necessary to prevent waste and protect correlative rights?

STATEMENT.

The parties are in sharp disagreement as to whether the order challenged in this case is an order regulating severance of natural gas from the soil or is an order fixing price in the field. The Supreme Court of Kansas construed the order as one imposing conditions precedent to withdrawal from the common source of supply without any application whatever to appellant's operations (Opinion of court below, R. 99, 101; 180 Kan. 454 at 461, 463, 304 P. 2d 528 at 534, 535).

In this court appellant ignores the construction placed upon the order by the court below and *assumes* its own construction of the order as one fixing field price. In view of this disagreement it seems to us necessary to present at least a brief review of the proceedings and evidence showing the problems with which the Commission was confronted and what it did to resolve them.

The present order is an outgrowth of a proceeding resolved by an order entered by the Commission in 1949 fixing a minimum wellhead price of eight cents for natural gas taken from the Kansas Hugoton Field.[1] The order presently under attack was entered in December, 1953, and prohibits withdrawal of natural gas from the common source of supply unless as a condition precedent thereto a minimum value of not less than eleven cents per Mcf be

[1] R. 41, 42, 45-47. See *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704, reh. den. 170 Kan. 341, 225 P. 2d 1054.

attributed thereto.[2] The record in both proceedings forms a part of the record in this court.[3]

The Kansas Hugoton Field is a common and interconnected deposit of natural gas located some 2400 feet below the surface of the land.[4] The character of natural gas is such that it can be transported only through pipelines constructed at such expense that it is economically feasible to construct only a very limited number of lines to the common source of supply.[5] This factor resulted in a monopoly without competition between the purchasing pipelines.[6] As an essential part of the operation of this

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[2]R. 44.

[3]R. 306.

[4]R. 224-226, 308, 322, 327-329, 344, 362.

[5]R. 166, 199, 205, 230-232, 321, 331-336, 345.

[6]R. 152, 175, 182, 201, 205, 217-218, 230, 232-233, 237-238, 331-336, 344, 349-350, 354, 409-410. By October, 1948, 99% of the 1106 wells producing from 692,298 acres in a nine-county area were connected to only six pipelines with additional undeveloped acreage already dedicated to another market. Practically the entire field was controlled by these pipeline dedications. R. 409-410, 334, Ex. 16 (1949) 410, 335. Although by 1952 the number of producing wells had increased to 2183, or by over 250%, with production from 1,783,271 acres, 98% of the wells were still controlled by only seven pipelines. R. 272-273. By September, 1957, over 98% of the wells were still connected to these seven pipelines, although the number of producing wells had increased to 3752, a three-fold increase from 1948, and the developed acreage had increased to 2,388,775. Kansas State Corporation Commission, Gas Proration Order and Report, Kansas Hugoton Field, September, 1957, Docket No. 54, 220-C, Summary, p. 137 (Appendix C, p. 62). 16.7% of the producing wells in 1952 were owned by pipeline systems, and the remainder were owned by a large number of producers of wells on lands belonging to approximately 15,000 separate owners. R. 203-204, 250.

Cf. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm.*, 332 U. S. 507, 522, note 20; *Federal Power Comm.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610, note 17 and text and dissenting opin-

pipeline monopoly, the pipeline companies refused to transport gas other than that which they themselves produced.[7] Wells drilled by independent producers remained unconnected for years, while the gas underlying their leased lands was drained by the pipeline companies.[8] Destructive competition resulted from the inability of producers to secure a market while their own supply was being drained by others.[9] Gas became a distress commodity.[10] It was treated as a commodity of little value

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ion of Jackson, J., 320 U. S. 631; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, dissenting opinion of Clark, J., 347 U. S. 694, 695; *Republic Nat. Gas Co.* v. *Oklahoma*, 334 U. S. 62, dissenting opinion of Rutledge, J., 334 U. S. 74-76; *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 340 U. S. 179, 181-183; *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Comm.*, 169 Kan. 722, 724, 222 P. 2d 704, 706; *Federal Power Commission Report to Congress*, 1948, Smith-Wimberly Report, pp. 129, 138-139, 185-186, 194, 232.

[7]R. 176, 323, 349-350, 354, 359, 364-396. Cf. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 76-77, See note 8, *infra*.

[8]R. 175, 182, 225-226, 228, 231, 332-334, 354, 364-396. Even as early as 1939, some wells had produced ten times as much gas as could have originally underlaid the leased tract (R. 362). Cf. Federal Power Commission Report to Congress, 1948, Olds-Draper report, pp. 133-136; Smith-Wimberly report, pp. 66-67, 69; *Republic Nat. Gas Co.* v. *Oklahoma*, 334 U. S. 62, dissenting opinion of Rutledge, J., 334 U. S. 74-76; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 181-183.

[9]R. 175, 182-183, 184, 205, 228, 337; 344-345. On subject of destructive competition, compare *Nebbia* v. *New York*, 291 U. S. 502; *Parker* v. *Brown*, 317 U. S. 341. On subject of correlative rights, compare Federal Power Commission Report to Congress, 1948, Smith-Wimberly Report, pp. 66-70; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, dissenting opinion of Rutledge, J., 334 U. S. 89-98; *Bandini* v. *Superior Court*, 284 U. S. 8.

[10]R. 175, 182, 184, 205, 228, 229-230, 233, 337, 338, 339, 344-345, 349-350, 351-352, 353-354, 356-357, 359, 365-366. Cf. Federal

without regard to the value which would have been attributed to it in a free, open, competitive market.[11] The monopolistic practices and distress conditions became perpetuated through life-of-production dedication requirements of the pipeline monopolies.[12] Physical and economic waste took place in the form of "blowing" gas, rapid depletion, avoidable leakage in pipeline and wellheads, the use of inefficient burners and appliances and inferior uses, such as manufacture of carbon black, to the eventual deprivation of domestic users.[13] Exploration in marginal and peripheral acreage was curtailed.[14] Full depletion

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Power Commission Report to Congress, 1948, Smith-Wimberly Report, pp. 9, 66-67, 231-232.

[11]R. 128-141, 143-144, 151-164, 175-176, 181-182, 205-222, 232-233, 237-238, 275-297.

[12]R. 176, 204, 237-238, 316. Cf. Federal Power Commission Report to Congress, 1948, Olds-Draper Report, p. 10; Smith-Wimberly Report, pp. 9, 232.

[13]R. 141-142, 143, 145-147, 149-150, 173-174, 176-177, 178-179, 186-187, 189-190, 192-193, 194-195, 198, 228-229, 232, 234-236, 237, 238-239, 240-241, 255, 256, 257, 265-269, 316-318, 339-341, 342-343, 345, 348, 350, 355-357.

On subject of physical waste compare Federal Power Commission Report to Congress, 1948, Smith-Wimberly Report, pp. 111-116; President's Materials Policy Commission Report, 1952, Vol. III, *Outlook for Energy Sources*, p. 22; Vol. 1, *Foundations for Growth and Security*, pp. 113-114; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 426; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61.

On subject of economic waste compare *Walls* v. *Midland Carbon Co.*, 254 U. S. 300; *Henderson* v. *Thompson*, 300 U. S. 258; *Federal Power Com.* v. *Hope Nat. Gas Co.*, *supra*, 320 U. S. 591, 617, note 30, *ibid.*, dissenting opinion of Jackson, J., 320 U. S. 634-636, 653-659; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179; Report of President's Materials Policy Commission, 1952, Vol. III, *Outlook for Energy Sources*, pp. 15-23; Vol. I, *Foundations for Growth and Security*, pp. 111-114.

[14]R. 149-150, 173-174, 229, 234-237, 238-239, 266-267, 268-269, 271, 342-343.

and exhaustion of wells was unlikely, and premature abandonment was probable.[15] There was no such thing as market value for gas because of lack of competition among pipeline purchasers.[16]

So far as gas production in the State of Kansas is concerned, the problems of the Hugoton Field are unique.[17]

The 1949 order resulted in substantial conservation and prevention of waste.[18] Marked development occurred in marginal or peripheral acreage, with a promise of much greater ultimate recovery from the underground reservoir.[18A] Increased development reduced drainage, and this afforded greater protection of correlative rights.[19] An immediate reduction occurred in low grade uses and the number of low grade carbon black plants was greatly

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[15]R. 149-150, 174, 232, 340-341.

[16]See notes 5, 6, 7, 9, 10 and 11, *supra*.

[17]The Kansas Corporation Commission exercises jurisdiction over twenty-one non-depleted gas fields. Commission Dockets No. 46,644-C, 43,238-C, 50,970-C, 52,323-C, 51-285-C, 54,935-C, 55,544-C, 54,644-C, 54,645-C, 54,646-C, 54,647-C, 54,648-C, 54,649-C, 54,650-C, 54,060-C, 53,829-C, 55,164-C, 55,148-C, 53,933-C, C-164. Only in the Hugoton Field has requirement of minimum value attribution been found necessary to prevent waste and protect correlative rights.

The Supreme Court of Kansas recognizes the field as differing from any other gas field in the state in this regard. *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 733, 222 P. 2d 704, 713.

[18]R. 228-229, 240-243, 265-272. Compare Federal Power Commission Report to Congress, 1948, Smith-Wimberly Report, pp. 190, 191, 192.

[18A]R. 229, 269; Cf. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, *supra*, 337 U. S. 498, 507; Federal Power Comm. Report to Congress, 1948, Smith-Wimberly Report, p. 191.

[19]R. 229, 269-270.

reduced.[20] Care began to be taken in completing wells so as to diminish the loss of large quantities of gas allowed to be blown into the atmosphere.[21] Greater care was taken to prevent leakage in pipes.[21] Curtailment of the use of gas for "dump gas" purposes in low grade industrial furnaces resulted.[22] More gas was available for domestic and other higher uses.[22]

Before the Commission and before the District Court of Finney County, Kansas, upon appeal from the order of the Commission, appellant defended upon a wide variety of grounds. But on appeal to the Supreme Court of Kansas, appellant abandoned all issues except the asserted conflict between the order and the jurisdiction of the Federal Power Commission.

SUMMARY OF THE ARGUMENT.

For the purposes of prevention of waste and protection of correlative rights the commission order imposes conditions upon the exercise of the local incident of severance of natural gas from the land of which it is a part.

ARGUMENT.

The necessity for conservation of natural gas has been considered by this court on a number of occasions.[23] The

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[20]R. 229, 241-243, 268-269. See note 9, *supra*.

[21]R. 266, 268. See note 13, *supra*.

[22]R. 241-242, 268-269. See note 13, *supra*.

[23]*Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Walls* v. *Midland Carbon Co.*, 254 U. S. 300; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55 at p. 76; *Henderson* v. *Thompson*, 300 U. S. 258; *Hunter* v. *Mc-*

power of state regulation for that purpose and to protect correlative rights has been upheld as against constitutional objections including those based upon the Commerce Clause.[24] The relationship between price or realized value and conservation has long been recognized.[25] The use by the states of price as a conservation measure has been

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Hugh, 320 U. S. 222; *Federal Power Comm.* v. *Hope Natural Gas Co.*, 320 U. S. 591 at 607-610, 612, 613, 615-617, *Ibid*, dissenting opinion of Jackson, J., 320 U. S. 629-636, 653-659, 660; *Colorado Interstate Gas Co.* v. *Federal Power Comm.*, 324 U. S. 581, dissenting opinion of Jackson, J., 324 U. S. 612; *Interstate Natural Gas Co.* v. *Federal Power Comm.*, 331 U. S. 682 at p. 690; *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, dissenting opinion of Rutledge, J., 334 U. S. at 89-96; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 at pp. 509-514; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, dissenting opinion of Clark, J., 347 U. S. 694, 695.

[24] *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179. See *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 254-258; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 76-77; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 509-514.

[25] *Walls* v. *Midland Carbon Co.*, 254 U. S. 300; *Henderson* v. *Thompson*, 300 U. S. 258; *Parker* v. *Brown*, 317 U. S. 341, 346, 355; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 608-610, 615-617; *Ibid*, dissenting opinion of Jackson, J., 320 U. S. at 652-659, 660; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, concurring opinion of Jackson, J., 324 U. S. 612; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690, 691; *Federal Power Comm.* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 506-507; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179; *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190. See Federal Power Commission Report to Congress (1948), Smith-Wimberly Report, pp. 175-177, 190-193, 231-232.

affirmed,[26] but the use by the Federal Power Commission under the Natural Gas Act of price as a conservation measure has been denied.[27]

In the case at bar appellant concedes that conservation is necessary and that the challenged order of the State Corporation Commission of Kansas effectively accomplishes that object.[28]

The pertinent portion of the order is as follows:

"That all persons, firms or corporations which take gas or cause gas to be taken from the Hugoton Gas Field in Kansas on and after January 1, 1954, 12:01 A.M., shall, as a condition precedent for withdrawal from the common source of supply, pay or attribute to all gas taken, except gas for the operations of leases, for all purposes including payments to pro-

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[26] *Nebbia* v. *New York*, 291 U. S. 502; *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346; *Parker* v. *Brown*, 317 U. S. 341; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179; *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190.

[27] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591. See *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690; *Colorado Interstate Gas Co.* v. *Federal Power Comm.*, 324 U.S. 581; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498.

The Federal Power Commission may take conservation into account, however, in the issuance of certificates of convenience and necessity. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 612.

[28] Opinion of court below, R. 98; 180 Kan. 460-461, 304 P. 2d 533:

"Finally it can be stated that, inasmuch as appellants have abandoned all questions involved in the court below except the jurisdictional one heretofore mentioned, we must and do assume, the evidence before the Commission was sufficient to sustain its findings to the effect the involved order, upheld and sustained by the trial court, was necessary and required in the interest of conservation and prevention of waste of gas in the Hugoton Field."

ducers, landowners, lease-owners and royalty owners, the fair and reasonable minimum price of not less than eleven cents (11¢) per Mcf. (14.65# p.s.i.a.) at the wellhead until further order or orders of this Commission." (R. 45).

The interpretation of that order by the lower court is as follows:

"* * * It suffices to say, that after a careful analysis thereof, we have no difficulty in construing its terms to mean that no person, firm or corporation—first of all the producer—can lift or take gas in its natural state from the depths of the Hugoton Field to a point further than the wellhead without, as a condition precedent to its withdrawal from the common source of supply, first attributing thereto a minimum price of not less than eleven cents per M.c.f. (14.65# p.s.i.a.). * * * (R. 99; 180 Kan. at 461, 304 P. 2d at 534).

"Finally appellants contend that the trial court in rendering its judgments determined the price order in question applied to the operations of the Gas Company. We do not agree. Resort to its judgment, heretofore quoted, discloses that all it did was uphold and sustain the order of the Commission, aimed at curtailing production in the Hugoton Field and based expressly on the premise the commission was not fixing a price for gas in the field but prescribing a minimum price for all gas at the wellhead as a condition precedent for withdrawals from the common source of supply in the interest of conservation." (R. 101, 180 Kan. 463, 304 P. 2d 535).[29]

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[29]This court accepts the order as thus authoritatively construed and applied. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, 288; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 18; *Hotel & R. E. Int. A.* v. *Wisconsin E. R. Board*, 315 U. S. 437, 440-441.

The Kansas Commission had interpreted the 1949 order as directly applicable to purchasers such as appellant. *Columbian*

We examine the order to determine whether it exceeds state power by invading the field of federal regulation as outlined in the Natural Gas Act, the only challenge advanced by appellant.

This court has frequently held that the Natural Gas Act took away from the states no power or authority previously possessed by them and was intended to fill the gap in which the states were powerless to act because of the Commerce Clause as interpreted by this court in such cases as *Missouri, ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298 and *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U. S. 83.[30] We follow

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Fuel Corp. v. *Panhandle Eastern Pipe Line Co.*, 176 Kan. 433, 437, 271 P. 2d 773, 777.

Pursuant to statutory authority (G. S. Kan. 1949, 55-706), Appendix A, p. 31, the Kansas Commission has interpreted the present order as inapplicable to purchasers. Printed in Appendix B are the proceedings before the Commission in Docket 52,417-C in which the Commission refused to take action against this very appellant *because as a purchaser and not a producer the order did not cover its operations.* The respect accorded to such administrative interpretations by this court is illustrated by *Phillips Petroleum Co.* v. *Cabot Carbon Co.*, 348 U. S. 867, vacating 10 Cir. 210 F. 2d 841 for "reconsideration in the light of the latest order of the Corporation Commission of Oklahoma pertaining to the order in question." The interpretative order of the Oklahoma Commission to which this court referred is the subject of consideration in *Cabot Carbon Company* v. *Phillips Petroleum Co.*, Okla. , 287 P. 2d 675.

The Commission's motion to dismiss this appeal was founded upon the fact that appellant was not affected by the order as interpreted by the Supreme Court of Kansas. The petition for review of appellant Cities Service from the administrative interpretation set forth in the appendix has been dismissed since the filing of the Commission's motion to dismiss herein.

[30] *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 506-508; *Public Utilities Co.* v. *United Fuel Gas Co.*, 317 U. S. 456, 467; *Federal Power Com.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 609, 610; *Colorado Interstate Gas Co.* v. *Fed-*

the mandate of this court that the "gap" consists of the limitations upon state authority as outlined in the decisions of this court prior to the enactment of the Natural Gas Act (15 U. S. C. A. 717, *et seq.*) in 1938.[31]

In *Champlin Refining Co.* v. *Corporation Commission*, (1931) 286 U. S. 210, the Commerce Clause was invoked in a challenge of Oklahoma's oil proration statute. In upholding the statute the court said (p. 235):

> "Plaintiff contends that the Act and proration orders operate to burden interstate commerce in crude oil and its products in violation of the commerce clause. It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products. Such production is essentially a mining operation and therefore is not a part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce. * * * (Citing cases). No violation of the commerce clause is shown."

In *Thompson* v. *Consolidated Gas Utilities Corp.*, (1936) 300 U. S. 55, the court said (p. 76):

> "Either production greater than the demand or use for an inferior purpose would necessarily involve

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eral Power Com., 324 U. S. 581, 599, 600; *Interstate Natural Gas Co.* v. *Federal Power Com.*, 331 U. S. 682, 689-693; *Panhandle Eastern Pipe Line Co.* v. *Public Service Com.*, 332 U. S. 507, 514-521; *Federal Power Com.* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502-504; *Federal Power Com.* v. *East Ohio Gas Co.*, 338 U. S. 464, 472, 473; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 682-685.

[31] *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 472, 473; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 684.

overground waste of gas. The manner, place or extent of production might lead to underground waste. We assume that the prohibition of any wasteful conduct, whether primarily in behalf of other owners of gas in the common reservoir, or because of the public interests involved, is consistent with the Constitution of Texas and that of the United States, and that to prevent waste production may be prorated. We assume, also, that the State may constitutionally prorate production in order to prevent undue drainage of gas from the reserve of well owners lacking pipe line connections. If proration were lawfully applied for any such purposes, the fact that thereby other private persons would incidentally and gratuitously obtain important benefits would present no constitutional obstacle. And the fact that plaintiffs' gas is to be sold in interstate commerce would not preclude such exercise of the State's power. * * * (Citing cases)."

The impact upon interstate commerce of the order under attack is precisely the same as the various occupation and license taxes upon the severance of minerals from the soil and we review those cases as this court did in the Champlin case.

Prior to 1938 this court upheld, as against constitutional challenges based upon the Commerce Clause, a variety of state occupation taxes based upon the value of a product manufactured or severed from the land, although the product was destined for interstate commerce.

In *Heisler* v. *Thomas Colliery Company*, (1922) 260 U. S. 245, the court upheld a Pennsylvania tax upon anthracite coal based upon the value of the product when prepared for market. In the opinion the court said (p. 259):

"The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty, of exportation of a product or article from a

state, determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries; it would nationalize and withdraw from state jurisdiction and deliver to Federal Commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production."

In *Oliver Iron Mining Co.* v. *Lord*, (1922) 262 U. S. 172, in upholding a Minnesota tax upon the mining of iron ore intended for interstate commerce, the court said (pp. 178, 179):

"Plainly the facts do not support the contention. Mining is not interstate commerce, but, like manufacturing is a local business, subject to local regulation and taxation. * * * (Citing cases). Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce. * * * (Citing cases).

"The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

In *Utah Power & Light Co.* v. *Pfost*, (1932) 286 U. S. 165, the court upheld an Idaho license tax upon the generation of electricity. The court there said (p. 181):

> "* * * We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing, and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture. * * * (Citing cases)."

In *Hope Natural Gas Co.* v. *Hall*, (1927) 274 U. S. 284, the court upheld a West Virginia license tax upon the production of natural gas based upon the wellhead value of the gas.

The Oliver case, the Utah Power case and the Hall case were all cited with approval as recently as 1953 in *Michigan-Wisconsin P. L. Co.* v. *Calvert*, 347 U. S. 157.

Gas in place is real estate.[32] Its conversion into personalty is accomplished by a mining operation commonly called production.[33] "When separation from the earth has

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[32]*Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 212; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 233; *Burden* v. *Gypsy Oil Co.*, 141 Kan. 147, 40 P. 2d 463; *Brooks* v. *Mull*, 147 Kan. 740, 78 P. 2d 879; *Richards* v. *Shearer*, 145 Kan. 88, 64 P. 2d 56; *Rathbun* v. *Williams*, 154 Kan. 601, 121 P. 2d 243; *In re Estate of Randolph*, 175 Kan. 685, 266 P. 2d 315. "Oil and gas as they are found in the earth are a part of the total physical aggregate which in law is designated land, and the legal relations respecting them are uniformly held to be real property. Summers, the Law of Oil and Gas, (1954), Vol. I, pp. 28-29.

[33]*Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 235.

been accomplished the 'production' is completed."[34] "It is not a commercial product when it is in the earth, but becomes so when brought to the surface and placed in pipes for transportation."[35] Until that time, an oil and gas lessee has no title to nor ownership of the gas which can be the subject of a sale.[36]

It has long been recognized by this court that regulation of the production of gas either for the prevention of waste or for the protection of correlative rights is local in character and that such orders as that presently under attack operate upon real property in advance of its being converted into a subject of commerce.

In *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, an Indiana statute prohibited flaring of gas for a period exceeding two days in length. This court upheld the statute. In the opinion it was said (pp. 211, 212):

> "In view of the fact that regulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the supreme court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the

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[34] *W. S. Hatch Co.* v. *Public Service Commission*, 3 Utah 2d 7, 277 P. 2d 809, 813.

[35] *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 256, quoting from *State ex rel. Corwin* v. *Indiana Oil, Gas & Min. Co.*, 120 Ind. 575, 22 N. E. 778.

[36] *Champlin Refining Co.* v. *Corp. Comm.*, 286 U. S. 210; *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Burden* v. *Gypsy Oil Co.*, 141 Kan. 147, 40 P. 2d 463; *Connell* v. *Kanwa Oil Co., Inc.*, 161 Kan. 649, 170 P. 2d 631; *In re Estate of Randolph*, 175 Kan. 685, 266 P. 2d 315; *Denver National Bank* v. *Comm. of Revenue & Taxation*, 176 Kan. 617, 272 P. 2d 1070.

substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the state of Indiana of a subject which especially comes within its lawful authority."

In *Walls* v. *Midland Carbon Co.*, 254 U. S. 300, a Wyoming statute prohibited under certain conditions the use of natural gas burned, consumed or wasted without the heat being fully utilized for other manufacturing or domestic purposes and under the same conditions prohibited its use for making carbon black. This court upheld the statute as a valid exercise of the state's police power. In the opinion the court, discussing *Ohio Oil* v. *Indiana*, *supra*, said (pp. 316, 317):

"* * * We said, citing a case, 'possession of the land is not necessarily possession of the gas,' and again, on the authority of cases, 'that the property of the owner of lands in oil and gas is not absolute until it is actually in his grasp, and brought to the surface.' It was decided, however, that *before that event occurs, indeed, in prevention of it*, the state may interpose its power to prevent a waste or disproportionate use of either oil or gas by a particular owner in order to conserve the equal right of other owners and advance the public interest. * * * It was hence decided that the power of the state 'can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste.'" (Emphasis supplied).

The statute involved in the Ohio Oil case was again discussed in *West* v. *Kansas Natural Gas Co.*, *supra*, where this court said, "Its purpose was to secure to the common owners of the gas a proportionate acquisition of it—a reduction to possession and property—*not to take away any*

right of use or disposition after it had thus become property." (221 U. S. 229, 254, emphasis supplied).

The Walls case was discussed in *Henderson* v. *Thompson*, (1937) 300 U. S. 258, in which the court upheld a Texas statute prohibiting the use of "sweet gas" in the manufacture of carbon black. The court there said (p. 267):

> "* * * One principle established by the Walls case is that the Legislature may, for the purpose of conserving natural resources, regulate their production and use. * * *"

The event upon occurrence of which a property right in gas as a commodity or subject of commerce arises is severance from the soil. As in the Ohio Oil and Walls cases, the Kansas order operates "before that event occurs" and "in prevention of it," except upon compliance with conditions necessary to prevent waste. It operates in exactly the same way as the proration statute in *Champlin Refining Co.* v. *Corporation Comm.*, 286 U. S. 210, *supra*, and the taxing statutes upheld in *Heisler* v. *Thomas Colliery Company*, 260 U. S. 245; *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165; and *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, all *supra*. "The police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter."[37]

We return to cases interpreting the Natural Gas Act to see whether anything contained in them weakens the effect of the decisions prior to 1938.

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[37] *Kidd* v. *Pearson*, 128 U. S. 1, at p. 26; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, at 238; *Parker* v. *Brown*, 317 U. S. 341, 367.

In *Federal Power Commission* v. *Hope Natural Gas Co., supra*, the court said (320 U. S. at 612):

> "We do not mean to suggest that Congress was unmindful of the interests of the producing states in their natural gas supplies when it drafted the Natural Gas Act. As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over 'the production or gathering of natural gas.' Section 1 (b). In addition, Congress recognized the legitimate interests of the states in the conservation of natural gas. By Section 11 Congress instructed the Commission to make reports on compacts between two or more States dealing with the conservation, production and transportation of natural gas. The Commission was also directed to recommend further legislation appropriate or necessary to carry out any proposed compact and 'to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.' Section 11 (a). Thus Congress was quite aware of the interests of the producing states in their natural gas supplies. * * *"

In *Interstate Natural Gas Co.* v. *Federal Power Commission, supra*, the court said (331 U. S. at 690):

> "* * * As was stated in the House Committee report, the 'basic purpose' of Congress in passing the Natural Gas Act was 'to occupy this field in which the Supreme Court has held that the States may not act.' In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act. Thus the House Committee Report states: 'The bill takes no au-

thority from State Commission, and is so drawn as to complement and in no manner usurp State regulatory authority * * *.' Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach. * * *"

In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, *supra*, the court said (337 U. S. at 509-513):

"* * * The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the state legislatures, in the interests of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas. The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other. Congress enacted this Act after full consideration of the problems of production and distribution. It considered the state interests as well as the national interest. It had both producers and consumers in mind. Legislative adjustments were made to reconcile the conflicting views."

We come finally to *Phillips Petroleum Company* v *Wisconsin*, 347 U. S. 672 and *Natural Gas Pipeline Company of America* v. *Panoma Corporation*, 349 U. S. 44.

The facts in those cases are important, so important in fact that they are ignored by appellant in its discussion of the Phillips case and are, at least inferentially, misstated in its discussion of the Natural Gas Pipeline cases (Brief 13). In the Phillips case, Phillips moved in its lines a commingled mass of gas, produced in part from its own wells and purchased in part from others, to its processing plants. After processing the gas moved in continuous flow to points where it was delivered to interstate pipeline companies. "Thus Phillips sells the gas after the time and beyond the place at which production and gathering are complete and after processing has intervened." (205 F. 2d at 708). "Petitioners admit that Phillips engages in 'the sale in interstate commerce of natural gas for resale,' as, of course, they must." (347 U. S. at 677). "We are of the opinion, however, that the finding is without adequate basis in law, and that production and gathering in the sense that those terms are used in section 1 (b), end *before* the sales by Phillips occur." (347 U. S. at 678, italics supplied). "By the time the sales are consummated, nothing further in the gathering process remains to be done." (347 U. S. at 680).

Natural Gas Pipeline Co. of America v. *Panoma Corporation*, October Term, 1954, No. 191, 349 U. S. 44, reversing 271 P. 2d 354; *Natural Gas Pipeline Co. of America* v. *Corporation Commission*, October Term, 1954, No. 321, 349 U. S. 44, reversing 272 P. 2d 425; *Michigan-Wisconsin Pipeline Co.* v. *Corporation Commission*, October Term, 1954, No. 320, 349 U. S. 908, reversing 272 P. 2d 425, and *Panhandle Eastern Pipeline Co.* v. *Corporation Commission*, October Term, 1954, No. 322, 349 U. S. 908, reversing 272 P. 2d 425, are factually identical. In each case the sale took place after processing had been completed. In each case the appellant contended that the order of the Okla-

homa Corporation Commission was invalid *insofar as it undertook to regulate sales made after gathering and processing had been completed.* None of the appellants were purchasers of raw gas at the wellhead. None of them made any contention that the commission order was invalid as applied to sales at the wellhead and none of them could have made such a contention if he had wished because he was wholly unaffected by it.

So far as material to the case at bar, the issues raised by the appellants were the following:

No. 191, No. 321:

> "Whether the Corporation Commission of Oklahoma has the power, consistently with the Commerce Clause of the Constitution of the United States (Art. I, Sec. 8, Cl. 3) and the Natural Gas Act (15 U. S. C. 717 *et seq.*) to fix the minimum price of *residue gas sold at the outlet of Panoma Corporation's gasoline plant to Natural, an interstate pipeline company, for immediate transportation interstate.*" (Joint Brief of Appellant, p. 3, italics supplied.)

Nos. 320, 321, 322:

> "Whether the Corporation Commission of Oklahoma has the power, consistently with the Commerce Clause of the Constitution of the United States (Art. I, Sec. 8, Cl. 3) and the Natural Gas Act (15 U. S. C. 717 *et seq.*), to fix the price of *residue gas sold at the outlet of a gasoline plant to an interstate pipeline company* for immediate transportation to markets in other states, or to prohibit the production of natural gas if the price fixed for *residue* gas obtained therefrom is not obtained." (Joint Jurisdictional Statement, p. 4, italics supplied.)

No. 322:

"Whether the Order of the Corporation Commission of Oklahoma, fixing the price of *residue* gas, as applied to the operations of appellant in purchasing such residue gas *at wholesale in the State of Texas* for immediate and continuous flow through its interstate pipe line system to markets in other states, violates the Commerce Clause of the Federal Constitution." (Jurisdictional Statement, p. 4, italics supplied.)

This court decided the issue thus raised in the following language:

"In these cases Oklahoma has attempted to fix a minimum price to be paid for natural gas, *after its production and gathering has ended,* by a company which transports the gas for resale in interstate commerce. We held in Phillips Petroleum Co. v. Wisconsin, 347 U. S. 672, 98 L. Ed. 1035, 74 S. Ct. 794, that *such* a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission. The Phillips case, therefore, controls this one." (349 U. S. 44, italics supplied).

"* * * Judgments reversed. Natural Gas Pipeline Co. v. Panoma Corp., Nos. 191 and 321, October Term, 1954, decided April 11, 1955 * * *." (349 U. S. 908).

The Supreme Court of Oklahoma, conforming to the mandate of this court in the cited cases, reversed and set aside Order No. 26096 of the Corporation Commission "insofar as sales of residue gas * * * under existing gas purchase contracts are concerned." (Unreported, entered October 8, 1956, in No. 35,732, October 8, 1956, in No. 35,731, and December 4, 1956, in No. 35,734.)

In each of the cases relied upon by appellant (consisting of those just discussed) the portion of the Oklahoma

Commission order which was held invalid attempted to regulate a sale in interstate commerce *after* production and gathering had been completed. But the Kansas order under attack does not regulate sales in interstate commerce at all, either before or after gathering. It regulates severance from the soil and operates prior to completion of production and prior to the time there is a commodity susceptible of either gathering, processing or sale. As the order plainly states, its requirements are "a condition precedent for withdrawal from the common source of supply." (R. 45).

The case of *Rutland Savings Bank* v. *Steele*, 155 Kan. 667, 127 P. 2d 471, involved the exercise of an option to purchase a one-half interest in oil, gas and other minerals at a price of $5 per acre. Would anyone contend that such a sale of real estate would have been governed by the Natural Gas Act if appellant, a natural gas company, had been the purchaser?

The decisions of this court are consistent with each other and make a unified whole. The states may regulate production for the purpose of preventing waste and may employ minimum price value-attribution as means of accomplishing that end. The states may not regulate wholesale sales of gas in interstate commerce after production and gathering for any purpose whatsoever.

The distinction between the two situations is well illustrated by the perfectly consistent cases of *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, *supra*, and *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157. In the Hope case the tax upon withdrawal of gas from the ground was approved because it was a regulation of the local incident of severance. In the Michigan-Wisconsin case the tax on "the first taking * * * of possession of such gas for

other processing or transmission * * * after such gas has passed through the outlet" of a processing plant was held invalid, because "the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun." (347 U. S. 167). There were no dissents in either of the two cases.

A similar analysis is found in *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, *supra*.

The differences in view of the members of the court in cases interpreting the Natural Gas Act have almost entirely related to interpretation of the exception in 1 (b) of the act withholding federal jurisdiction over production and gathering. But the Kansas order needs no support from the exception. It comes squarely within the language of the House report in relation to the exception:

> "* * * 'The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill.' HR Rep. No. 709, 75th Cong. 1st Sess., p. 3."[38]

In footnote 30, *supra*, pp. 11-12, we have listed decisions of this court pointing out that the Natural Gas Act was enacted to fill the "gap" which existed because of constitutional limitations upon state authority over interstate commerce. But if appellant's theory should prevail, a new "gap" of at least equal importance would be created. This

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[38]Quoted in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, *supra*, 337 U. S. 504.

court has specifically held that the Natural Gas Act confers no price fixing authority for conservation purposes upon the Federal Power Commission.[39] That the Federal Power Commission has no authority to protect correlative rights in a common underground reservoir is apparent. If the State of Kansas is to be denied the use of *minimum* price or value attribution as a means of preventing waste and protecting correlative rights in the Hugoton Field because of the Natural Gas Act, the primary purpose of which is to protect the consumer[40], the most effective conservation measure is lost[41], and in view of the existing purchasers' monopoly and life of the field contracts[42], the only effective means of protecting correlative rights is lost.[43] But this court has already stated that no such interference with a state's regulation of the "physical production and gathering of natural gas in the interests of conservation" is intended by the act, and "where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely

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[39]*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

[40]*Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 685; *Federal Power Com.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610.

[41]R. 170-171, 172-173, 348. See notes 10, 11, 13, 14, 15, 18, 18a, 19, 20, 21, and 22, *supra*. Cf. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 187-188 and cited portions of the dissent in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 657-660. See further in the dissent, 320 U. S. at p. 653.

[42]See notes 5, 6, 7, 8, 9 and 12, *supra*.

[43]See *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190; *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 340 U. S. 179, 182; *Republic Natural Gas Co.* v. *State*, 198 Okla. 350, 180 P. 2d 1009 and the opinions of this Court dismissing the appeal, *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 72; *Ibid.*, dissenting opinion of Rutledge, J., 334 U. S. 74.

connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach."[44]

Appellant cites the unreported case of *Deep South Oil Company of Texas* v. *Federal Power Commission*, 5 Cir., June 29, 1957, No. 15849[45]. The decision was by a divided court. The case holds that a sale in interstate commerce *after production* but *before completion of gathering* is governed by the Natural Gas Act. The opinion recognizes that it is the first and only case so to hold. The case differs from the case at bar in one fundamental respect. It involves solely the exception in 1 (b) of the Act, whereas the Kansas order regulates severance, a subject over which no jurisdiction was ever conferred upon the Federal Power Commission, and an incident which creates a commodity and which precedes the interstate sale which causes jurisdiction of the Federal Power Commission to attach.

Apart from the fact that the case is not in point upon the issue now before the court, the case either ignores or

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[44] *Interstate Natural Gas Co.* v. *Federal Power Commission*, *supra*, 331 U. S. 690.

[45] This opinion together with the opinion in the companion case of *Shell Oil Company* v. *Federal Power Commission*, 5 Cir., June 29, 1957, No. 15900, are printed in an appendix to the petition for certiorari in *Shell Oil Company* v. *Federal Power Commission*, October Term, 1956, No. 449.

Appellant also cites the unreported case of *Continental Oil Company* v. *Federal Power Commission*, 5 Cir., June 29, 1957, No. 16130, also a companion case to the *Deep South* case. The decision in the Continental case, in the expressed view of the court, presented "the identical legal principles involved" in *Deep South* and *Shell* and it added no further reasoning to that expressed therein, discussed in the text above, slip opinion, p. 8.

misinterprets the decisions of this court. The court eliminated the exemption of gathering by the simple expedient of saying that the exception cannot take away the jurisdiction previously conferred, although it is a part of the same sentence.

In making this excision of the exception the court relied upon its own opinion in *Interstate Natural Gas Company* v. *Federal Power Commission*, 156 F. 2d 949, but ignored the opinion of this court in the same case, where the court said (331 U. S. at 690):

> "* * * Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach. But such conflict must be clearly shown. Exceptions to the primary grant of jurisdiction in the section are to be strictly construed. * * *"

To us strict construction and excision differ markedly. The court's excision of the exception conflicts with a number of other statements by this court:

> "And the Federal Power Commission was given no authority over the 'production or gathering of natural gas.'" (*Federal Power Commission* v. *Hope Natural Gas Co., supra*, 320 U. S. at 610).

> "Accordingly, Congress in section 1 (b) of the Act not only prescribed the intended reach of the Commission's power, but also specified the areas into which this power was not to extend. * * *. The Act, moreover,

expressly exempts from its coverage * * * (4) the production and gathering of natural gas." (*Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, *supra*, 337 U. S. at 503, 504).

"* * * Before the Colorado Interstate decision, it was apparent that the value of producing facilities and the cost of gas bought by a natural-gas company from producers would be weighty factors in rate making whether a rate-base method or other method for fixing rates was used. Low valuation by the Commission of producing properties or low-cost allowance for purchased gas discourages exploration for gas or its sale in interstate commerce. Congress knew this necessary relationship between production and distribution but excluded the Commission from exercising any direct control or regulation over the actual production and gathering of natural gas." (*Ibid.* 337 U. S. at 506-507).

"Similarly, in *Colorado Interstate Gas Co.* v. *Federal Power Com.*, 324 U. S. 581, we stated that *transportation and sale do not include production and gathering* * * *." (*Phillips Petroleum Co.* v. *Wisconsin*, *supra*, 347 U. S. 678, emphasis supplied).

The majority opinion in the Deep South case mentions only *Phillips* v. *Wisconsin* and seems to proceed upon the theory that it overruled all prior decisions interpreting the Natural Gas Act. This court's opinion in the Phillips case cites all of its prior cases interpreting the Act, without limiting or overruling any of them.

CONCLUSION.

The judgment below should be affirmed.

Respectfully submitted,

CLYDE MILLIGAN, General Counsel,
State Corporation Commission of Kansas,
State Office Building,
Topeka, Kansas,

FRANK G. THEIS, Special Counsel,
301 A. C. Office Building,
Arkansas City, Kansas,

WAYNE COULSON, Counsel,
*DALE M. STUCKY, Counsel,
901 First National Bank Building,
Wichita, Kansas,

Attorneys for Appellees.

*Attorney upon whom service is to be made.

APPENDIX "A."

Section 55-706 of Article 7, Chapter 55, G. S. Kan., 1949.

Proceedings upon petition. Proceedings may be instituted before the commission upon petition of any interested party, or by the attorney general on behalf of the state, or on the motion of the commission, upon any question relating to the enforcement of this act or the promulgation, revocation, amendment, renewal, interpretation, extension, or the enforcement of any rule, regulation or order, or the determination of any right thereunder, in the manner provided in section 55-605 of the General Statutes of Kansas of 1935, as amended, and that each and all of the provisions of said section as amended, shall apply to and govern such proceedings under this act. [L. 1935, ch. 213, Sec. 6; L. 1945, ch. 233, Sec. 8; March 24.]

APPENDIX "B."

Proceedings Before State Corporation Commission in Docket No. 52,417-C

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the matter of the petition and complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association relating to the enforcement and interpretation of the act relating to the production and conservation of natural gas and the order of December 2, 1953, issued pursuant thereto, in Docket No. 44,079-C (C-3216), Conservation Division, and complaining of violations thereof by Magnolia Petroleum Company and Cities Service Gas Company.

Filed 8th day of June, 1956, Docket No. 52417-C (C-5040)
State Corporation Commission
State of Kansas
By Raymond B. Harvey
Secretary

Petition and Complaint

Come now the Southwest Kansas Royalty Owners Association and J. F. Austin, Complainants and Petitioners, and represent and show to the Commission as follows:

1. On December 2, 1953, the Commission entered its order in its Docket No. 44,079-C (C-3216), Conservation Division, which order is incorporated herein by this reference there and made a part hereof. Said order provides, in part, as follows:

"IT IS FURTHER BY THE COMMISSION ORDERED: That all persons, firms or corporations which take gas or cause gas to be taken from the Hugoton Gas Field in Kansas on and after January 1, 1954, 12:01 A. M., shall, as a condition precedent for withdrawal from the common source of supply, pay or attribute to all gas taken, except gas for the operations of leases, for all purposes including payments to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum price of not less than eleven cents (11¢) per M. c. f. (14.65 pounds p. s. i. a.) at the wellhead until further order or orders of this Commission."

Said order is now and has been at all times relevant in full force and effect and has not been modified or amended in any way.

2. J. F. Austin, referred to as "Austin," is now and has been at all times relevant, a resident of Terrell Hills, Bexar County, Texas, and, as is hereinafter more fully set forth, is a landowner within the meaning of said order.

3. The Southwest Kansas Royalty Owners Association, referred to as the "Association," is now and has been at all times relevant, a non-profit membership corporation organized and existing under and by virtue of the laws of the State of Kansas, all of whose members are owners of mineral or lessor's royalty interests in the Hugoton Gas Field of Kansas and are landowners and royalty owners within the meaning of said order.

4. Magnolia Petroleum Company, referred to as "Magnolia," is now and has been at all times relevant, a corporation organized and existing under and by virtue of the laws of the State of Texas and duly authorized and empowered to transact business within the State of Kansas as a foreign corporation, with its general offices and post office address, Magnolia Building, Dallas, Texas. Magnolia

takes gas or causes gas to be taken from the Hugoton Gas Field in Kansas and withdraws natural gas from the producing structures constituting such common source of supply and is a producer of gas and lease owner, all within the meaning of said order, as is hereinafter alleged with greater particularity.

5. Cities Service Gas Company, referred to as "Cities Service," is now and has been at all times material, a corporation organized and existing under and by virtue of the laws of the State of Delaware and duly authorized and empowered to transact business within the State of Kansas as a foreign corporation, with its general offices and post office address, First National Building, Oklahoma City, Oklahoma; also maintaining an operating office in the Insurance Building, 212 North Market Street, Wichita, Kansas. Cities Service takes gas or causes gas to be taken from the Hugoton Gas Field and is a purchaser of gas within the meaning of said order, as is hereinafter alleged with greater particularity.

6. The subject matter of this petition and complaint is one of common or general interest to many and numerous persons described herein. It is impractical to bring them all before the Commission. For this reason and in order to prevent a multiplicity of complaints, these petitioners and complainants bring this petition and complaint in and for their own benefit and in behalf of and for the benefit of all landowners and royalty owners so identically or similarly situated, as well as in their capacity as members of the general public interested in the enforcement of the Statutes of Kansas relating to the Production and Conservation of Natural Gas, G. S. 55-701 *et seq.*, and of the lawful rules, regulations and orders issued by this Commission thereunder.

7. Magnolia has been at all times relevant the owner and operator of gas leasehold estates covering approximately 100,136 acres of land located within the Kansas Hugoton Gas Field. Petitioners and complainants are unable to state the exact number of royalty owners and landowners entitled to gas royalty payments reserved in said leases, but allege that they number more than 500, many of whom belong to the "Association." Austin is one of such persons, as the owner of an undivided one-thirty second interest in and to all of the oil, gas and other minerals in and under the following described land situated in Grant County, Kansas, to-wit:

> The Northeast Quarter of Section 4, Township 27 South, Range 35 West, containing 160 acres more or less.

By reason thereof, the approximately 500 persons above mentioned are landowners or royalty owners within the meaning of said order.

8. Magnolia, as the owner and operator of said leases, has caused to be drilled and completed on said 100,136 acres approximately 155 wells producing gas only, including the G. E. Dew No. 1 well, located on a consolidated gas leasehold estate containing the land belonging to Austin, above-described. Magnolia has at all times material taken raw natural gas through said well bores, from the porous limestone and dolomite underground structures constituting the Kansas Hugoton Gas Field and has withdrawn natural gas from such producing structures constituting such underground common source of supply through such wells, and has been and is a producer and lease owner.

9. Magnolia has produced and sold the following quantities of raw natural gas from said wells: (Figures show M. c. f. of gas, 14.65 p. s. i. a.)

[APPENDIX]

Month	All Wells	G. E. Dew No. 1 Well
December, 1955	2,151,910	14,705
January, 1956	2,267,948	15,069
February, 1956	2,069,252	11,766
March, 1956	1,837,216	4,132
Totals	8,326,326	45,672

10. All of said gas has been and is being sold, after completion of production, by Magnolia to Cities Service under a gas purchase contract entered into between Magnolia and Cities Service on or about June 17, 1946. Cities Service has, after said sale, and pursuant to said contract, taken said gas into its possession for distribution and resale elsewhere, and by reason thereof takes gas or causes gas to be taken from said field, and is a purchaser of gas, all within the meaning of said order.

11. By virtue of the provisions of said leases, all of such landowners are entitled a landowner's one-eighth royalty and Austin is specifically entitled to landowner's royalty based on a full 1 32nd of 1 4th of 1 8th of all the gas produced from said G. E. Dew No. 1 well.

12. Effective January 1, 1954, Magnolia, pursuant to said order, began paying royalty to its said landowners and royalty owners based on price or attribution of value at the wellhead of eleven cents per M. c. f. for all such gas. Such payments continued for all gas produced until December 1, 1955. On or about January 3, 1956, Magnolia sent a letter to all of its royalty and mineral owners under its said wells, copy of which is attached hereto as Exhibit "A" and made a part hereof. All of its gas royalty payments for production since December 1, 1955, have been

computed on the basis of only 5.229 cents per M. c. f. (14.65 p. s. i. a.).

13. Magnolia has tendered to its landowners and royalty owners the total approximate amount of only $54,422.75 as the one-eighth landowner's royalty due by reason of said production during said four months, and has tendered to Austin the sum of only $2.29 by reason of such production for said well, which payments Austin and other owners have refused to accept.

14. Under said order Magnolia was required to pay royalties based on the minimum price of eleven cents per M. c. f. for gas at the wellhead, or a total sum of approximately $114,486.98 to all of said landowners and royalty owners by reason of production from all of such wells, and was required to pay to Austin the sum of $4.96 by reason of such production from said single well.

15. By reason of such failure to pay, required by said order, Magnolia is indebted to said 500 landowners and royalty owners in the approximate total amount of $114,-686.98 and is indebted to Austin in the amount of $4.96, together, in each instance, with interest from the time payments should have been made pursuant to the terms of each lease.

16. By reason of such failure to pay or attribute pursuant to said order, both Magnolia and Cities Service have been since December 1, 1955, and are now, violating said order and are in contempt thereof and of the Commission. They have wholly failed, neglected and refused to make payments as required thereunder or to attribute the minimum value required therein.

17. Magnolia and Cities Service, by reason of said order, are jointly and severally liable to all of the royalty

owners and mineral owners under said leases for the difference between the amounts heretofore payed during said four months based on a price of only 5.229 cents per M. c. f. and the amounts that are due and owing under said order, based on an attribution of value of eleven cents per M. c. f. at the wellhead.

18. Production under the circumstances herein set forth constitutes waste within the meaning of said order and the laws of Kansas. Both Magnolia and Cities Service will continue to violate and disregard said order unless the Commission enters an order or orders as prayed for herein.

Wherefore, petitioners and complainants pray as follows:

1. For an order directed to Magnolia and Cities Service, and each of them, requiring them to pay to Austin and all of the other landowners and royalty owners, with respect said leases, royalty based on 11 cents per M. c. f. (14.65 p. s. i. a.) retroactive to December 1, 1955, and that said takers of gas account to the Commission and report such payments as a condition precedent to the further taking of gas or the further causing of gas to be taken from said field and as a condition precedent to further withdrawals from said common source of supply, and in the absence of such retroactive payments and accounting and report, that the Commission, by appropriate order, prevent any further taking or withdrawal by said two companies, or either of them.

2. For an order directed to Magnolia and Cities Service, and each of them, requiring like payments in the future to all such landowners and royalty owners, as a condition precedent to further taking or withdrawal.

3. That this matter be set down for hearing, after due notice, to permit petitioners and complainants to prove the allegations hereof and to permit Magnolia and Cities Service to show cause why the relief prayed for herein should not be granted.

4. For such other and further relief to which petitioners and complainants may be entitled, and for such further orders as may be necessary for the implementation, interpretation and enforcement of said order dated December 2, 1953.

EXHIBIT "A"

MAGNOLIA PETROLEUM COMPANY

A Socony-Vacuum Company
Natural Gas Department

P. O. Box 900
Dallas 21, Texas

January 3, 1956

Re: Kansas Hugoton Gas Field Minimum Price Order, Docket No. 44079-C (C-3216); Cities Service Gas Company v. Magnolia Petroleum Company, No. Civil Action W-1095, United States District Court for the District of Kansas at Wichita.

Dear Royalty Owner: Cities Service Gas Company filed suit against Magnolia Petroleum Company in the above case seeking to have declared invalid the minimum price order above referred to. At the same time Cities Service Gas Company sued Magnolia Petroleum Company for the difference between 11 cents per M. c. f. at 14.65 pressure base and 6 cents per M. c. f. at 16.4 pressure base covering all payments made since January 1, 1954.

[APPENDIX]

Cities Service Gas Company has failed to pay Magnolia for any gas delivered to it since July 23, 1955. Magnolia has continued to make payments to you based upon 11 cents per M. c. f. at 14.65 pressure base up to and including the payments made to you in December, 1955.

Cities Service Gas Company has tendered into the Federal District Court at Wichita, Kansas, the money due since their last payment to us. Magnolia Petroleum Company has filed a motion to withdraw the amount due calculated at 6 cents per M. c f. at 16.4 pressure base. This motion has been set for hearing for January 10, 1956. We anticipate that such a motion will be granted and that we may pay you upon your prorata portion of the gas delivered from your lease at the rate of 6 cents per M. c. f. on a pressure base of 16.4. This will result in a reduction in your royalty at the present time. This suit will be defended vigorously to recover the difference between 6 cents per M. c. f. at 16.4 pressure base and 11 cents per M. c. f. at 14.56 pressure base. In the event such an additional amount is recovered payments will immediately be made to you based upon the additional amount which may be due you.

We regret to inform you of this occurrence and trust that you fully understand our position in the matter. The Kansas Corporation Commission which issued the minimum order has sought to intervene in the above suit pend-

(January 3, 1956—Page 2)

ing in the Federal District Court. We can assure you that the minimum price order above referred to will be defended in every respect. If any additional information is desired, please do not hestitate to call upon us. You, of course, are vitally interested in the outcome of this suit. In the event that Cities Service Gas Company should recover in this suit you would have been overpaid from Jan-

uary 1, 1954 through December, 1955 as explained in our letter to you of February 1, 1954.

Yours very truly,

MAGNOLIA PETROLEUM COMPANY.
By R. D. HANLEY, *Vice President.*

RDH:RM:gw

Order to Show Cause

Now, on this 13th day of June, 1956, the above-entitled matter comes before the Commission on its own motion and the Commission having examined the "petition and complaint" herein finds:

1. That the complaint herein was filed June 8, 1956; that it relates to alleged violations by Magnolia Petroleum Company and Cities Service Gas Company of the Commission order dated December 2, 1953, in Docket No. 44,079-C (C-3216) which requires the attribution of a minimum value of 11 cents per M. c. f. to natural gas at the wellhead as a condition precedent for withdrawing such gas from the Hugoton Gas Field in Kansas.

2. That Magnolia Petroleum Company is presently a producer of gas, lease owner and operator in the Hugoton Gas Field within the meaning of the Commission order referred to in Finding (1).

3. That Cities Service Gas Company is not a producer but is a purchaser of gas from the Kansas Hugoton Gas Field; that it purchases Hugoton gas from the producing companies and distributes said gas for resale. That, as stated in the above mentioned complaint, Cities Service purchases the gas therein described from Magnolia "after completion of production."

4. That the Commissioner's order of December 2, 1953, above outlined, is a conservation and prevention of waste order which deals only with the production of natural gas in the Kansas Hugoton Field.

5. That J. F. Austin and the Southwest Kansas Royalty Owners Association should be permitted to show cause, if any there be, at a public hearing herein, why the complaint herein should not be dismissed as to Cities Service Gas Company.

IT IS THEREFORE, BY THE COMMISSION ORDERED: That J. F. Austin and the Southwest Kansas Royalty Owners Association show cause, if any there be, at a public hearing hereinafter ordered, why the complaint herein should not be dismissed as to Cities Service Gas Company.

IT IS FURTHER BY THE COMMISSION ORDERED: That a public hearing be held in respect to the matters herein on Friday, June 29, 1956, at the Lassen Hotel, Wichita, Kansas, commencing at 9 o'clock a. m., or as soon thereafter as the same may be reached by the Commission.

That the Commission retains jurisdiction of the subject matter and the part for the purpose of entering such further order or orders as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

[SEAL] RAYMOND B. HARVEY, *Secretary.*

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Order

Now on this 18th day of July, 1956, the above-entitled matter comes further before the Commission on its own motion, and the Commission, having examined the petition and complaint filed herein, the oral motion of Cities Serv-

ice Gas Company to dismiss with reference thereto, and having considered the arguments presented at the show cause hearing had on June 29, 1956, herein, finds:

1. That on June 13, 1956, this Commission entered its order to show cause directed at the petition and complaint filed herein setting the matter for hearing on June 29, 1956; that due notice of said hearing was given as provided by law to all persons interested therein; that J. F. Austin, the Southwest Kansas Royalty Owners Association, Magnolia Petroleum Company and Cities Service Gas Company all appeared by and through their respective counsel at said hearing and were heard. That the General Counsel of the Kansas Corporation Commission appeared on behalf of the Commission and the public generally. There were no other parties appearing.

2. That at the inception of said hearing Cities Service Gas Company made its oral motion to dismiss the petition and complaint in its entirety and urged as grounds therefor, in effect, that the order of December 2, 1953, in Docket No. 44,079-C (C-3216), involved herein, has been construed by courts of competent jurisdiction and by the Commission (1) to apply to purchasers of gas as well as to producers of gas (2) to apply to purchasers of gas taking delivery at the end of gathering and (3) as a price-fixing order regulating sales of gas at the wellhead and sales after gathering; that by reason of such prior construction this Commission now has no jurisdiction to construe or interpret said order in any other manner; and that such interpretation is binding on this Commission and, so construed, causes it to be in violation of Federal statutory and constitutional provisions relating to interstate commerce. That by being in violation of Federal laws in such cases made and provided, the Commission order of December 2, 1953,

is void and of no force and effect. That since the Commission had no jurisdiction initially to promulgate such an order, it likewise now has no jurisdiction to construe it.

3. That under G. S. 1949, 55-706, proceedings may be instituted before the Commission upon petition of any interested party upon any question relating to the interpretation or the enforcement of any order of the Commission, or the determination of any right thereunder. That said petition and complaint is a proper petition within the meaning of said statute and that the Commission has jurisdiction to entertain, hear and determine the same.

4. That under the rules of practice and procedure of this Commission complaints may be filed by parties who complain of any thing done or omitted to be done in violation of the orders of this Commission; that said petition and complaint conforms with said rules of practice of the Commission and the Commission has jurisdiction to entertain the same; that upon the filing of such complaint under said rules of practice and procedure the Commission will examine the same to ascertain whether the allegations, if true, establish a *prima facie* case.

5. That it is the duty of this Commission under such statute, upon proper petition, to interpret its own orders and determine rights thereunder and that in order to determine whether said complaint establishes a *prima facie* case against Cities Service Gas Company it is also necessary for the Commission under its rules of practice and procedure to interpret, construe and apply said order.

6. That after careful consideration of the Cities Service motion and all of the matters alleged therein, the Commission finds that it has never interpreted said order in the manner described in said motion to dismiss and that no court of competent jurisdiction has so interpreted it.

7. That said order dated December 2, 1953, is valid and subsistent and in full force and effect. It was within the jurisdiction of the Commission to make and under the statutes and rules of practice and procedure the Commission also has jurisdiction to interpret and enforce said order and determine rights thereunder.

8. That the "Hugoton Gas Field in Kansas" within the meaning of the order referred to in Finding 2 hereof is an underground common source of supply of raw, natural gas located in porous limestone and dolomite formations at an average depth of 2700 to 2800 feet below the surface of the earth.

9. That the gas referred to in said order is raw, natural gas so located and so situated in said underground reservoir and common source of supply.

10. That Magnolia Petroleum Company takes such raw, natural gas and causes such natural gas to be taken from said underground reservoirs constituting the Hugoton Gas Field in Kansas and that it withdraws such raw, natural gas from said underground formations constituting said field; that it is a producer and lease owner, all within the meaning of said order.

11. That after Magnolia has taken or caused such raw, natural gas to be taken from said underground formations and after it has completed such taking and such withdrawal, and the production thereof, it sells said gas to Cities Service Gas Company.

12. That Cities Service Gas Company does not take gas or cause gas to be taken from the underground formations constituting such field and does not withdraw gas from said common source of supply, and is not a producer of gas or a lease owner, within the meaning of said order,

but is rather a purchaser of gas from the producer thereof, namely, Magnolia Petroleum Company, and that after such purchase Cities Service Gas Company transports and distributes such gas for resale.

13. That the Commission's order of December 2, 1953, above-outlined, is a conservation order designed to prevent waste and to protect correlative rights with respect to such raw, natural gas and deals only with the production or with-

drawal, or conditions of production or withdrawal of such raw, natural gas in said field.

14. That the relief sought in paragraph numbered 1 of the prayer of said petition and complaint is as follows:

> "For an order directed to Magnolia and Cities Service, and each of them, requiring them to pay to Austin and all of the other landowners and royalty owners, with respect said leases, royalty based on 11 cents per M. c. f. (14.65 p. s. i. a.) retroactive to December 1, 1955, and that said takers of gas account to the Commission and report such payments as a condition precedent to the further taking of gas or the further causing of gas to be taken from said Field and as a condition precedent to further withdrawals from said common source of supply, and in the absence of such retroactive payments and accounting and report, that the Commission, by appropriate order, prevent any further taking or withdrawal by said two companies, or either of them."

15. That the motion of Cities Service Gas Company was urged on the additional ground that the Commission has no authority to enter an order such as sought in paragraph (1), above quoted, and that such an order would be, in effect, the granting of a money judgment.

16. After consideration of the contention of Cities Service in this respect, the Commission finds that its order of December 2, 1953, a conservation order, fixed no price for gas and established no rates; that an order such as that sought in said paragraph (1) of the petition could not recover back the gas, if any, withdrawn or taken from the field and wasted in violation of the order and would appear to have no reasonable relation to the ultimate objectives of the order, and, under the facts of this case, does not appear to be a proper penalty to be imposed for violations of the order, if any there be.

17. Insofar as it pertains to the relief sought in paragraph (1) of the prayer of the petition and complaint, the motion of Cities Service Gas Company should be sustained and that portion of the petition should be dismissed.

18. That the motion of Cities Service Gas Company to dismiss should be overruled in all other respects.

19. That J. F. Austin, the Southwest Kansas Royalty Owners Association and all other parties interested should be permitted to show further cause, if any there be, at the public hearing hereinafter ordered why the petition and complaint should not be dismissed as to Cities Service Gas Company.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That, insofar as it pertains to the relief sought in paragraph numbered 1 of the prayer of the petition and complaint, the motion of Cities Service Gas Company should be and it is hereby sustained, and that portion of the petition and complaint should be and it is hereby dismissed.

IT IS FURTHER BY THE COMMISSION ORDERED: That the motion of Cities Service Gas Company to dismiss should be and it is hereby overruled in all other respects.

IT IS FURTHER BY THE COMMISSION ORDERED: That J. F. Austin, the Southwest Kansas Royalty Owners Association and all other parties interested should be permitted to show further cause, if any there be, at a public hearing hereinafter ordered why the complaint herein should not be dismissed as to Cities Service Gas Company.

IT IS FURTHER BY THE COMMISSION ORDERED: That a public hearing be held in respect to the matters herein on the 24th day of August, 1956, at the Lassen Hotel, Wichita, Kansas, commencing at 9 o'clock a. m., or as soon thereafter as the same may be reached by the Commission.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

[SEAL] RAYMOND B. HARVEY, *Secretary.*

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Petition and Application for Rehearing

Come now J. F. Austin and the Southwest Kansas Royalty Owners Association, and state and move as follows:

1. On July 18, 1956, this Commission entered an order herein which found and held, in part, as follows:

> "14. That the relief sought in paragraph numbered 1 of the prayer of said petition and complaint is as follows: 'For an order directed to Magnolia and Cities Service, and each of them, requiring them to pay to Austin and all of the other landowners and royalty owners, with respect said leases, royalty based on 11 cents per M. c. f. (14.65 p. s. i. a.) retroactive to December 1, 1955, and that said takers of gas ac-

count to the Commission and report such payments as a condition precedent to the further taking of gas or the further causing of gas to be taken from said Field and as a condition precedent to further withdrawals from said common source of supply, and in the absence of such retroactive payments and accounting and report, that the commission, by appropriate order, prevent any further taking or withdrawal by said two companies, or either of them.'

"15. That the motion of Cities Service Gas Company was urged on the additional ground that the Commission has no authority to enter an order such as sought in paragraph (1), above quoted, and that such an order would be, in effect, the granting of a money judgment.

"16. After consideration of the contention of Cities Service in this respect, the Commission finds that its order of December 2, 1953, a conservation order, fixed no price for gas and established no rates; that an order such as that sought in said paragraph (1) of the petition could not recover back the gas, if any, withdrawn or taken from the field and wasted in violation of the order and would appear to have no reasonable relation to the ultimate objectives of the order, and, under the facts of this case, does not appear to be a proper penalty to be imposed for violations of the order, if any there be.

"17. Insofar as it pertains to the relief sought in paragraph (1) of the prayer of the petition and complaint, the motion of Cities Service Gas Company should be sustained and that portion of the petition should be dismissed.

"IT IS THEREFORE, BY THE COMMISSION ORDERED: That, insofar as it pertains to the relief sought in paragraph numbered 1 of the prayer of the petition and complaint, the motion of Cities Service Gas Company should be and it is hereby sustained, and that

portion of the petition and complaint should be and it is hereby dismissed."

2. The records of this Commission show that said order was mailed to petitioners and complainants by the Conservation Division on July 24, 1956, and under Rule 82-1-8 of the Rules of Practice and Procedure, service was completed on July 26, 1956. This petition and application is filed pursuant to Rule 82-1-87 of said rules and Article 7 of Chapter 55 of the General Statutes of Kansas.

3. Petitioners and complainants are aggrieved by the portions of said order set forth above.

4. Said order is unlawful and unreasonable for the reason that it fails to conform with *Natural Gas Pipeline Company of America* v. *Panoma Corporation*, Okla. , 271 P. 2d 354, involving a similar question.

Involved in said case was the order of the State Corporation Commission of the State of Oklahoma, dated December 9, 1946, which provided, in part, as follows:

> "1. That no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field in Texas County, Oklahoma, at a price, at the wellhead of less than 7 cents per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch.'" (271 P. 2d at 363.)

In said case Panoma sold natural gas taken from said field to Natural, and Natural refused to pay the price as provided in said order. Thereafter, Panoma, after demand for the same made upon Natural, which demand was refused, made an application to the State Corporation Commission of Oklahoma to require Natural to comply with said order and pay a wellhead price of 7 cents for gas taken or to be taken from Panoma's leases in said field.

The Commission found, among other things, that Natural should pay Panoma the difference between the lesser amount actually paid for gas and the sum or price due at 7 cents; that strict enforcement of the price order was necessary for the prevention of waste; that the contract between Panoma and Natural could not impede or impair the effect of the order and that the acceptance of the contention that Natural need pay only the contract price would cause and invite discrimination and general breakdown of the regulation preventing waste.

As stated by the Supreme Court of Oklahoma (271 P. 2d at 358):

> "Commission ordered in effect that Natural should pay for all gas received on and after January 1, 1951, at the sum and rate of 7 cents per thousand cubic feet at the wellhead. Commission further ordered that Natural should pay to Panoma a 'backpay' sum sufficient to equal 7 cents per thousand cubic feet for all gas taken by Natural prior to January 1, 1951, at a lesser price.
>
> "Commission further ordered that if Natural should fail after 20 days to pay such 'back-pay' sum to Panoma, or should fail to pay as much as 7 cents wellhead price for gas taken after January 1st, 1951, that Panoma should cease any delivery of gas to Natural.
>
> "On this appeal Natural contends as upon its response below, with the further contention that Commission's 'back-pay' order has the effect of a money judgment which Commission was not authorized to enter."

5. Said contention made in said cause by Natural is the identical contention made by Cities Service Gas Company herein, as described in the Commission's Finding No. 15, above quoted. In disposing of said contention adverse to

the position of Cities Service in these proceedings, the Supreme Court of Oklahoma stated (271 P. 2d at 361-362, 363):

"We do not agree that the order of Commission was in any sense the rendition of a money judgment against Natural. It was merely a calculation and statement of the amount Natural should have paid for the gas taken before January 1, 1951, to comply with the price fixing order. There was no controversy as to the contract between the parties, nor as to the amount of gas Natural had received from the wells of Panoma, nor as to the amount Natural had paid on the purchase price thereof. By express provision of the contract, as well as by law, the contract was modified by the price order and the minimum wellhead price of 7 cents became a part thereof and Natural was obligated by law to pay that price of 7 cents. The calculation and statement of this 'back pay' sum by Commission was merely a statement of the further sum Natural should pay to bring itself in full compliance with the minimum price requirement. Commission could not enforce it as a money judgment, however, this does not mean that Commission is without any power to enforce compliance with its valid price fixing order. As in case of any other valid order, Commission may require compliance therewith by any other order within its authority, so in this case, while Commission could not require Natural to pay this sum, it could prohibit Natural from taking further gas until it brought itself into compliance with the effective price order by making the payment. If it were otherwise Commission would be powerless to take any steps to require compliance with its valid orders in the highly important program of conservation, and might as well not make them.

"We hold that the order as to this 'back pay' sum was within the authority of Commission. . . .

"Since the Corporation Commission had authority to make price fixing orders without violating the federal Constitution, then further orders within its authority designed to enforce compliance with such orders would likewise involve no violation of the federal Constitution. To hold otherwise would bring about the result that the Corporation could and did make this specific price fixing order as applied to the Guymon-Hugoton field and the making of the order was not in violation of the federal Constitution, but that subsequent valid orders directing compliance with the price fixing order would so violate the federal Constitution. Such a conclusion, to say the least of it, would be most peculiar and quite illogical. Therefore, and upon the foregoing authorities we find no merit in this contention."

6. By reason thereof, the portions of the order set forth herein are contrary to law and decided cases and is unreasonable, improper and unfair.

Wherefore, petitioners and complainants move for an order granting them a rehearing with respect the portions of the order dated July 18, 1956, set forth herein.

Filed 3d day of August, 1956, State Corporation Commission for the State of Kansas, by Raymond B. Harvey.

Order

Now on this 10th day of August, 1956, the above-entitled matter comes before the Commission for further consideration upon the petition for rehearing filed herein by petitioners and complainants. The Commission, having reexamined its files and records and being fully advised in the premises, finds:

1. That the Commission's order of July 18, 1956, was a valid exercise of its authority.

2. That the petition for rehearing filed herein by petitioners and complainants, is without merit.

3. That said petition for rehearing heretofore referred to should be denied.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That the petition for rehearing by petitioners and complainants in this docket be and it is hereby denied.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

[SEAL] RAYMOND B. HARVEY, *Secretary.*

ga

Order

Now on this 31st day of August, 1956, comes on for hearing the show cause order heretofore entered in the above-captioned matter, J. F. Austin and the Southwest Kansas Royalty Owners Association being present by their attorneys, Howard Fleeson, Dale M. Stucky and A. E. Kramer; the Cities Service Gas Company being present by its attorneys, O. R. Stites, Joe Rolston and Mark H. Adams; Magnolia Petroleum Company being present by its attorney, Charles S. Lindberg. The Commission and the public generally appeared by C. C. Linley, General Counsel, and Harold E. Jones, Assistant General Counsel. No other appearances were made. Thereupon after having examined all of the files and pleadings pertaining hereto, hearing evidence and the argument of counsel, the Commission finds:

1. That due notice of the time, place and subject matter of this hearing has been given to everyone concerned and said notice of hearing is hereby approved.

2. That the Commission has jurisdiction of the parties and of the subject matter herein and has full authority to determine the issues presented at this time.

3. That as outlined in its show cause order hereinbefore entered the complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association should be dismissed as against Cities Service Gas Company.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That the complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association be, and the same hereby is, dismissed as against Cities Service Gas Company.

IT IS FURTHER BY THE COMMISSION ORDERED: That the hearing on the complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association against Magnolia Petroleum Company be, and it hereby is, continued to a date later to be announced by the Commission.

Except as is herein stated, the Commission retains jurisdiction of the subject matter and of the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

[SEAL] RAYMOND B. HARVEY, *Secretary.*

hp

Petition of Cities Service Gas Company for Rehearing

COMES NOW Cities Service Gas Company, a party to the captioned proceedings and having appeared by counsel of record, Mark H. Adams, 202 Wheeler Kelly Hagny Building, Wichita, Kansas; O. R. Stites and Joe Rolston, 1063 First National Building, Oklahoma City, Oklahoma, and having participated in the captioned proceedings be-

fore the Commission and introduced and offered evidence therein hereby petitions this honorable Commission for a rehearing in the captioned proceedings with respect to the orders of the Commission wherein Commission under date of August 31, 1956, dismissed the petition and complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association as against Cities Service Gas Company and overruled and denied the motion of Cities Service Gas Company to dismiss the captioned proceedings in toto. In support of this petition for a rehearing, the facts and reasons for granting the same are as follows:

(1) The order of Commission dated August 31, 1956, dismissing the petition and complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association as to Cities Service Gas Company was based upon a purported show cause order not authorized by law, statute or the Rules and Regulations of said Commission, but contrary thereto; is not based on substantial or competent evidence produced at any hearing before said Commission, but is contrary thereto; is an abuse and in excess of the discretionary powers of said Commission and constitutes unlawful and unreasonable action.

(2) Commission committed material and reversible error in not sustaining in toto petitioner's motion to dismiss the entire proceedings in the captioned matter for the reason that the record shows that this Commission has no jurisdiction or authority to entertain such proceedings. The particular grounds set forth in petitioner's motion to dismiss made in said proceedings and renewed at the close of said proceedings, are made a part hereof by reference.

(3) Commission committed material and reversible error in rejecting and refusing to receive in evidence the

proferred testimony of petitioner's witnesses J. L. Willard and Russell W. Hofsess.

(4) The Commission's minimum gas price fixing order for the Kansas Hugoton Gas Field dated December 2, 1953, effective January 1, 1954, as evidenced by the clear language used therein is not ambiguous and by reason thereof is not subject to interpretation, construction or explanation by Commission.

(5) Assuming arguendo that Commission has the legal authority to interpret the aforesaid minimum gas price fixing order, the Commission erred in refusing to comply with petitioner's request at the hearing herein that it interpret the order as to its application to and effect upon the price Magnolia Petroleum Company was and will be required thereunder to charge this petitioner and which petitioner will be required to pay for gas produced by Magnolia Petroleum Company in said Kansas Hugoton Gas Field and sold and delivered by Magnolia to petitioner under a gas purchase contract dated June 17, 1946, in which the parties had agreed to a price less than that provided in Commission's minimum price order. As the Commission well knows this petitioner is the largest taker of gas from said Kansas Hugoton Gas Field. The evidence proferred by petitioner was to the effect that petitioner had entered into a gas purchase contract with Magnolia Petroleum Company for the life of the production from approximately 100,269 acres of leaseholds in said field, upon which there have been drilled 156 producing gas wells, the gas from which is now being sold and delivered to petitioner by Magnolia under said subsisting gas purchase contract; that at the end of July, 1956, the estimated remaining gas reserves of said leasehold was 844,134,608 MCF; that the contract price for such gas for a period of

fifteen years from and after the first delivery under said contract (this fifteen year period will not expire until 1963) is six cents (6¢) per M. c. f. on a pressure base of 16.4 psia; that during the year 1955 petitioner purchased from Magnolia under said contract in excess of 18,000,000 M. c. f. of gas or a daily average in excess of 50,000 M. c. f., and is currently taking gas at the same rate, which gas has been, prior to the promulgation of said price fixing order, and is now transported by petitioner in interstate commerce for resale. This evidence which was offered by petitioner and refused admittance by Commission clearly discloses the necessity that petitioner know and be fully informed as to the application and effect of said minimum gas price fixing order as applied to petitioner's purchases of gas under said contract from Magnolia. Petitioner contends that Commission is, for each and all of the reasons set forth in petitioner's motion to dismiss the captioned proceedings in toto, without jurisdiction with respect to such proceedings. If the Commission has such jurisdiction, which petitioner denies, the refusal of Commission to comply with petitioner's request constitutes material and reversible error.

(6) Assuming arguendo that the Commission's order of dismissal as against Cities Service Gas Company constitutes an interpretation of said minimum gas price fixing order hereinbefore referred to, petitioner here asserts that Commission had no jurisdiction or authority to issue such interpretation because as evidenced by the record in the captioned proceedings, the District Court of Finney County, Kansas, in case No. 9934, entitled Cities Service Gas Company v. State Corporation Commission of the State of Kansas, *et al.*, determined said order, on Commission's motion to dismiss said proceedings, was applicable to the operations of petitioner in its purchase of gas in

said Field, which motion of Commission to dismiss was overruled and denied by said District Court and no appeal or cross appeal has been or can be taken therefrom by Commission, and therefore Commission has no jurisdiction or authority to interpret said order to the contrary.

(7) Assuming arguendo that Commission's order of dismissal as applied to Cities Service Gas Company constitutes an interpretation of said minimum gas price fixing order heretofore mentioned, such interpretation is not authorized and is beyond the jurisdiction of the Commission because the Supreme Court of Kansas has already interpreted an order identical in form and content with said minimum gas price fixing order, except as to price, contrary to the Commission's purported interpretation.

(8) Commission's order dismissing the captioned proceeding as against Cities Service Gas Company without any restriction or limitation therein denies petitioner due process of law because it precludes petitioner and denies petitioner the opportunity to be heard on that portion of said petition and complaint against Magnolia Petroleum Company, petitioner's supplier of gas from the Kansas Hugoton Gas Field.

(9) That while Commission's order of dismissal of captioned proceedings as to Cities Service Gas Company is dated August 31, 1956, petitioner does not know when said order was made and had no knowledge of such order or the contents thereof until September 13, 1956, the Commission's having wholly failed and neglected theretofore to serve on or make available to petitioner, a copy of such order. If it is determined that petitioner was required to file this its petition for rehearing within ten days from the date of said order of dismissal, then the failure of Commission as aforesaid to serve said order on petitioner as re-

quired by law and the rules and regulations of said Commission denies petitioner due process of law.

WHEREFORE, petitioner respectfully prays Commission for an order setting aside said order of dismissal as to petitioner alone and said order overruling petitioner's motion to dismiss such proceedings in toto hereinbefore referred to, granting petitioner a rehearing in the captioned proceedings, and upon such rehearing dismiss said proceedings in toto.

Filed 1st day of September, 1956, State Corporation Commission, for the State of Kansas, by R. B. Harvey.

Order

Now on this 24th day of September, 1956, comes on for consideration the petition of Cities Service Gas Company for rehearing in the above entitled matter with respect to the order of the Commission under date of August 31, 1956, wherein it dismissed the petition and complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association as against Cities Service Gas Company.

The Commission having examined the files, pleadings and all other papers connected with said docket, and being fully advised in the premises, finds:

1. That the Commission order was served upon petitioner, Cities Service Gas Company by mailing a copy thereof at Topeka, Kansas, on September 12, 1956, and that the application for rehearing herein is filed within ten (10) days after the completion of service of the Commission order upon petitioner and consequently is filed within the time prescribed by statute and by the Commission's rules in such matters made and provided.

2. That each of the matters set forth in said application for rehearing as reasons for the granting of the same have been duly considered by the Commission.

3. That the application for rehearing should be denied.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That the application for rehearing herein of Cities Service Gas Company with reference to the Commission's order dated August 31, 1956, wherein the petition and complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association as against Cities Service Gas Company was dismissed, be, and the same hereby is, denied.

The Commission retains jurisdiction of the subject matter and of the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

[SEAL] RAYMOND B. HARVEY, *Secretary.*

APPENDIX "C."

Gas Proration Order and Report, September, 1957, p. 137
Docket No. 54,220-C

State Corporation Commission of Kansas

HUGOTON FIELD

SUMMARY, SEPTEMBER, 1957

Purchaser	Wells	Acreage	Aug. Runs
Cities Service	1,319	844,785	8,739,185
Colorado Interstate	345	221,037	559,859
Hugoton Production	152	96,358	2,095,562
Kansas-Colorado	30	18,635	234,204
Kansas-Nebraska	259	167,873	1,740,214
Northern Natural	1,011	639,918	4,859,251
Panhandle Eastern	505	316,583	3,772,739
Quinque	12	7,586	23,425
Shallow-Water	2	1,280	3,121
United Carbon	117	74,720	509,906
Total	3,752	2,388,775	22,537,460